No. 84-1379

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,
Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,
Appellees,

and

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT AND SUPPLEMENTAL BRIEF

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APPELLANTS' MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

Appellants Eugene F. Diamond and Jasper F. Williams, by their attorneys hereby respectfully move this Court for

leave to file a supplemental brief after oral argument. In support thereof, they state:

1) This case was argued on November 5, 1985.

2) A significant portion of the questions at oral argument centered around this Court's jurisdiction in this case and Appellants' interests in taking this appeal.

In response to questions concerning the interests of Appellants, the Court was made aware of the fact that there was a substantial award of attorney's fees pending against Appellants in this case. That award of fees could only be reduced in amount if Appellants were allowed to pursue this appeal. If Appellants prevailed upon the issues on appeal, the fees associated with this appeal and the appeal in the Seventh Circuit could not

be assessed against Appellants since Appellees would not have prevailed on those issues. See, Hensley v. Eckerhart, 461 U.S. 424 (1983).

3) At the time of oral argument, no final judgment with respect to the liability of Appellants for attorney's fees had been rendered.

4) Appellees suggested that there was a possibility that the district court would not hold Appellants liable for attorney's fees and that Appellants could not rely on the possibility of an award of fees as an additional basis for their asserted interests in this appeal.

5) The District Court issued its decision on March 6, 1986 holding Appellants liable for attorney's fees in the amount of $100,530.84. Charles v. Daley, Nos. 79-C-4541, 79-C-4548 (N.D. Ill. filed Mar. 6, 1986). See, Appendix

Thus, there is now a final judgment with respect to Appellants' liability for attorney's fees.

6) In addition to the other interests set forth in Appellants' reply brief concerning the continuing existence of a justiciable case or controversy, properly presented by Appellants in this case, is the specific and substantial pecuniary interest of Appellants in avoiding an award of attorney's fees.

Wherefore, Appellants request that their Motion for Leave to File a Supplemental Brief After Oral Argument be granted.

Respectfully submitted,

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DATED: March 18, 1986

TABLE OF AUTHORITIES

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IN THE
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EUGENE F. DIAMOND, M.D. and
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APPELLANTS' SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

ARGUMENT

This case was argued on November 5, 1985. A significant portion of the questions at oral argument centered around this Court's jurisdiction in this

case and Appellants' interests in taking this appeal. The purpose of this brief is twofold: 1) to inform this Court that a final decision holding Appellants liable for attorney's fees in the amount of $100,530.84 has been rendered, see, Appendix, and 2) to explain the significance of that decision with regard to Appellants' interests in taking this appeal.

In Hensley v. Eckerhart, 461 U.S. 424 (1983), this Court held that fees cannot properly be awarded for work done on unsuccessful claims. The issues on appeal before this Court are separate and distinct from the issues which were not appealed in this case. Should this Court reverse the Court of Appeals and uphold the constitutionality of the challenged provisions, Appellees could not be said to have prevailed on those issues. Accor-

dingly, the award of fees against Appellants would have to be reduced substantially.[1]

Appellants set forth a number of arguments in their reply brief concerning the continuing existence of a justiciable case or controversy in this case and continue to rely on those arguments. Appellants now have an additional interest to protect by taking this appeal--securing a reduction in the substantial amount of fees for which they have been held liable.[2]

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1. The amount would have to be reduced almost 10% for work done on these unsuccessful claims in the Court of Appeals alone. An additional amount should be deducted for work done on these issues in the District Court.

2. Although Dr. Williams died in a plane crash last April, a claim for the full amount of attorney's fees already has been filed against his estate.

CONCLUSION

For the above reasons and those set forth in Appellants' Reply Brief, a justiciable case or controversy does exist for this Court to review and the case should not be dismissed.

Respectfully submitted,

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DATED: March 18, 1986

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 79 C 4541
	)	
DALEY, et al.,	)	
	)	
Defendants.	)	
	)	
HOPE CLINIC FOR WOMEN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 79 C 4548
	)	
HARTIGAN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the court on the intervening defendants' motion to amend this court's order of April 22, 1985, which apportioned plaintiffs' fees award equally between the State defendants and the intervening defendants. The intervenors, in an earlier motion, asked

the court to amend its order in light of the Supreme Court's ruling in Kentucky v. Graham, 105 S.Ct. 3099 (1985). Therefore, on October 21, 1985, the court directed the parties to brief the issue. For the reasons which follow, the intervenors' motion to amend is denied.

In its original ruling on the issue of whether the intervenors, as private parties, could be assessed attorneys' fees under section 1988, this court found that although intervenors could not have been named defendants, once they chose to enter the suit as a party, fees were taxable against them. Charles v. Daley, Nos. 79 C 4541 & 79 C 4548, Mem. Op. at 3 (N.D. Ill. April 22, 1985), citing Vulcan Society of Westchester County v. Fire Department, 533 F.Supp. 1054, 1062 (S.D. N.Y. 1982). Further, it rejected arguments that because the State defendants

were available to pay the fees in full or had failed to seek contribution for fees from intervenors, they should bear the full liability for the fees. Therefore, the court split the award for fees equally between the State defendants and intervenors.

Further support for the court's initial ruling can be found in the rationale of Akron Center for Reproductive Health, et al. v. City of Akron, et al., 604 F.Supp. 1268 (N.D. Ohio 1984). In Akron, the intervening defendants were private individuals who joined in the defense of an Akron city ordinance regulating abortions performed on minor women. The court limited the intervenors' participation to issues directly affecting the scope of their intervention, but with regard to other issues, the intervenors were limited to amicus

curiae briefs. Id. at 1272.

The Akron court found the intervenors had voluntarily chosen to align themselves with the city-defendants and by doing so "contributed to the effort required of plaintiffs to substantiate their position in Court." Id. at 1273. The court rejected arguments similar to those advanced here--that the intervenors took no actions to violate plaintiffs' rights and that an award of fees would stop them and others from performing a valuable public function by defending such statutes. The Akron court and this court have rejected these arguments and found intervenors' inability to provide the relief sought by plaintiffs does not constitute a ground for denial of fees. Further, the intervenors could fulfill their public function of developing law and promotin g constitutional values by

acting in th role of amicus curiae.

Additionally, the Akron case cites authority in the Northern District of Illinois which supports this court's position, as well as the specific proportionment of the attorney's fees. Intervenors argue the Akron case is inapposite because the court there awarded a "mere 5% of the total fee award against the intervening defendants." Reply Mem. at 4. In Wynn v. Scott, No. 75 C 3957 Mem. Op. (N.D. Ill. Jan. 11, 1980), Judge Marshall had one of the intervenors from the present action acting as an intervenor in a similar action--a challenge to the Illinois abortion Acts of 1975 and 1977. Plaintiffs sought their fees only from the State defendants and not the intervenors. The Wynn court found that the plaintiffs could not place the full

burden of the fees on the State. Instead, the court reasoned that Dr. Diamond intervened, vigorously contested plaintiffs' position, and pursued an appeal to the Seventh Circuit and, therefore, the State defendant "should not be held responsible for any more than 50% of the amount which we have concluded would be reasonable award in this case." Mem. Op. at 6 (emphasis added).

The intervenors now ask the court to review its earlier reasoning in light of the Supreme Court's holding in Kentucky v. Graham. In Graham, the plaintiffs alleged a deprivation of their federal rights as a result of excessive force used against them during a raid and arrest. They filed a section 1983 suit seeking money damages against the Commissioner of the Kentucky State Police and seeking only recovery of fees from

the Commonwealth of Kentucky. The district court dismissed the Commonwealth as a party because it enjoyed immunity under the Eleventh Amendment. The suit was settled during trial in favor of the plaintiffs, who then moved to recover their fees as prevailing parties against the Commonwealth. The district court granted the fees requested and the Sixth Circuit Court of Appeals affirmed the award.

On appeal, the Supreme Court reversed, finding that section 1988 will not allow attorneys' fees to be recovered from a governmental entity where the prevailing plaintiff sues the governmental employees in their personal capacities only. The Court viewed the case as one requiring it to distinguish between personal and official capacity suits within the context of section 1988

fees. Because the Graham plaintiffs sued and prevailed against the employees in their personal capacity only, the plaintiffs won against the individual employees, not the entity which employed them. To permit the plaintiffs to recover fees against the government as a result of prevailing againt the employees in their personal capacity would destroy the distinction between personal and public capacity suits against governmental officials and would be inconsistent with Monell's doctrine that a municipality cannot be liable under section 1983 on the basis of respondeat superior. The Court concluded that only a prevailing official capacity action plaintiff is entitled to look for relief on the merits and for the fees from a governmental entity. The Eleventh Amendment prevented the Commonwealth from

being a party to the suit and, therefore, the fees award against it was reversed.

The intervenors analogize their position to that of the Commonwealth in that neither could be the party legally responsible for relief on the merits. The Commonwealth enjoyed immunity and the intervenors could not provide the injunctive relief plaintiffs sought. Further, they note that the act of intervening does not convert them into a party responsible for fees. "That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone a non-party." Graham, 105 S.Ct. at 3106. Therefore, the intervenors conclude that they and the Commonwealth share similar positions as parties who cannot be liable under section 1983 and cannot, therefore, be liable for section 1988 fees.

The court is not persuaded that the Graham decision requires it to amend the fees award. First, the court notes that the Commonwealth was a named defendant and was then dismissed as a party from the case. Hence, the Graham plaintiffs were seeking fees from a non-party who could not and should not have been pulled into the suit. The intervenors in this case could not have been named parties, but chose to become full parties to the litigation by intervening and refusing the role of amicus curiae. As this court, the Akron court, and the Wynn court have observed, once the intervenors chose to enter the suit and to become parties, they placed themselves in a position to bar plaintiffs from gaining the relief they sought. Therefore, they stand in a different position than the Commonwealth in Graham. The intervenors

are not named parties or non-parties, but individuals who voluntarily became fully participating parties. The Commonwealth was a non-party and decided to remain a non-party by refusing to waive its immunity.

Second, the intervenors' inability to enforce the abortion law does not grant them total immunity from fees once they become parties to the suit. This inability does raise issues about intervenors' standing to appeal the Seventh Circuit's decision to the Supreme Court once the State defendants determined not to appeal. Therefore, intervenors may lack Article III standing and lack the ability to enforce the challenged law, but they did <u>not</u> lack the ability to pose a "substantial barrier" to plaintiffs' realization of their constitutional rights during litigation before this

court. In contrast, the Commonwealth's immunity and decision not to waive its immunity eliminated its ability to prevent the Graham plaintiffs from the relief they sought.

For these reasons, the court finds that the Graham decision does not require that this court amend its fees award. The rationale underlying the fees apportionment in this case and others is not disturbed by Graham's holdings and conclusions concerning section 1988 fees and personal capacity suits against government employees.

/s/
Charles P. Kocoras
United States District Judge

Dated: Mar. 6, 1986